Supreme Court, U.S.
FILED

94 697 OCT 18 1994

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No._____

In The

Supreme Court of the United States

October Term, 1994

RICHARD BARRETT,

Petitioner

vs.

THE MISSISSIPPI BAR,

Respondent

On Writ of Certiorari to the Supreme Court of Mississippi

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

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QUESTIONS PRESENTED

1. Is an attorney entitled to due process of law under the Fourteenth Amendment or under traditional notions of fair play so as to be afforded some reasonable time limitation upon the bringing of ethics charges against him, particularly when trial is not had until after some nine years?

2. Is Rule 8.1 of the *Rules of Discipline for the Mississippi State Bar (1984)* unconstitutional on its face or as applied under the due process and equal protection clauses of the Fourteenth Amendment?

3. Is Rule 26 of the *Rules of Discipline for the Mississippi*

State Bar (1984) unconstitutional on its face or as applied under the due process and equal protection clauses of the Fourteenth Amendment?

PARTIES BELOW

The Mississippi Bar

Richard Barrett

CASES BELOW

The original case was *Mississippi State Bar v. Richard Barrett*, Complaint No. 82-31-1 (1982). The appeal below is *Richard Barrett v. The Mississippi Bar,* No. 92-BA-00336 (1994).

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On Writ of Certiorari to the Supreme Court of Mississippi

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

Petitioner, Richard Barrett, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Mississippi in this matter.

OPINION BELOW

The ruling of the Supreme Court of Mississippi from which certiorari is sought is contained in the case styled *Richard Barrett v. The Mississippi Bar*, at the Appendix, dated July 21, 1994, which issued a public reprimand to an attorney. Although the ruling affirmed a ruling by a complaint tribunal, the proceeding in the Supreme Court is regarded as having the effect of an *ab initio* matter.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 *USC* §1257(3).

RELEVANT STATUTORY PROVISIONS

The Fourteenth Amendment, §1, which reads:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Rule 8.1 of the *Rules of Discipline for the Mississippi State Bar (1984):*

Within ten (10) days following the designation of a Complaint Tribunal, the presiding judge shall establish a tentative schedule for discovery, motion hearings and rulings, trial and adjudication, all of which shall be completed within one hundred and eighty (180) days from the date of the designation of the Tribunal, unless extended by the Court on motion of either party for good cause shown.

Rule 26 of the *Rules of Discipline for the Mississippi State Bar (1984):*

References to time within these rules and procedural sections are directory and not jurisdictional. Time limitations are administrative, not jurisdictional; however, the time for filing appeals or seeking reinstatement shall be jurisdictional. Failure to observe directory time interval may result in

contempt of the agency having jurisdiction but will not justify abatement of any disciplinary investigation or proceeding.

SUMMARY OF THE ARGUMENT

An important issue is presented not only of the court's supervision of attorneys and the overall administration of justice, but of the public's interest and confidence in the judicial system, together with the rights and responsibilities of members of the bar.

An attorney, no less than any other citizen, is entitled to due process of law and fundamental fairness. This Court has recently recognized the practice of law as a being "fundamental right." When a charge of ethical violation is brought against an attorney, the accused may not necessarily be subject to the strict "speedy trial" constraints of a criminal proceeding; however, some reasonable time limits should prevent an unlimited or arbitrary delay in bringing the case to trial. A delay of some nine years violates due process under the Fourteenth Amendment as well as derogates traditional notions of fair play. Violation of its own rules by Respondent, as well as the rules' own patent arbitrariness on their face or as applied by Respondent, further compound the unconstitutionality at hand.

STATEMENT OF THE CASE

On July 29, 1982, Respondent filed an ethics' complaint against Petitioner alleging that on March 3, 1982 Petitioner had brought an emancipation proceeding in behalf of a father and daughter, in one county, while a guardianship was pending in another county, without advising the court. Petitioner answered that the purported guardianship was void *ab initio* as having been established without notice to the parent or daughter, and that, consequently, no notice was required thereof; that the only issues germane to the proceeding were the residency of the

minor and the minor's ability to act as an adult; and that, in any event, Petitioner acted according to law or in good faith pursuant to *ABA Code of Professional Responsibility,* Canon 7, EC 7-4 (1982).

On December 5, 1988, Respondent filed a "formal" complaint against Petitioner. On March 26, 1990, Petitioner filed a motion to dismiss alleging lack of speedy trial. The Motion was overruled on May 1, 1990. On May 14, 1990, Petitioner filed an Emergency Petition for Interlocutory Appeal with the Mississippi Supreme Court alleging lack of speedy trial. The Petition was overruled on June 6, 1990. On May 23, 1990, a hearing was scheduled, but was adjourned by the Court, on grounds of Petitioner's illness, over objections of Petitioner who refused to ask for a continuance, alleging that he wished to preserve his objections to lack of speedy trial. On April 2, 1991, Petitioner filed a Motion To Dismiss, again alleging lack of speedy trial. The Motion was overruled on April 26, 1991.

On May 3, 1991, the cause was tried and judgment entered that Petitioner should be issued a public reprimand. The case was appealed to the Mississippi Supreme Court on April 8, 1992. On July 21, 1994, the Mississippi Supreme Court affirmed the reprimand; two justices dissented on the grounds that Petitioner had been denied due process and fundamental fairness due to the nine-year, lengthy delay in bringing the case for trial.

REASONS FOR GRANTING THE PETITION

PROPOSITION

AN ATTORNEY IS ENTITLED TO DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT OR UNDER TRADITIONAL NOTIONS OF FAIR PLAY SO AS TO BE AFFORDED SOME REASONABLE TIME LIMITATION UPON THE BRINGING OF ETHICS CHARGES AGAINST HIM, PARTICULARLY WHEN TRIAL IS NOT HAD UNTIL AFTER SOME NINE YEARS.

Threshold questions are: Is the issue of due process for attorneys accused of ethical violations of sufficient importance to warrant consideration by this Court? It would seem so, given that the practice of disciplining attorneys is widespread and essential to the overall administration of justice.

Are attorneys, then, entitled to due process in ethics' proceedings? Although disciplinary proceedings have been left largely to the states,[1] this Court has, on occasion, exercised its supervision to assure that constitutional protections have been afforded, as need be. For instance, less than ten years ago, the practice of law was held to be a fundamental right, *cf. Supreme Court of New Hampshire v. Piper,* 470 U.S. 274 (1985) (under the privileges and immunities' clause).

What, then, would be the extent of due process projections, if due process is afforded to accused attorneys? The authorities below are not uniform and this Court has not heretofore spoken on the issue of time limits respecting the bringing and trying of

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[1] Mississippi, for instance, did not allow a lawyer to confront witnesses against him in an ethics' proceeding until 1986, *Attorney K v. Mississippi State Bar,* 491 So.2d 220 (Miss.1986) (Petitioner, here, was counsel in that case and secured the extension of due process rights).

ethics' charges.

Ethics' charges are not "criminal" in the sense that the accused attorney is not facing jail; however, the accused's reputation, livelihood and good name are property and liberty considerations bound up in Fourteenth Amendment protections,[2] or should be, the same as any other accused citizen. As Justice McRae, dissenting, below, observed, there is nothing in the federal constitution by which an attorney loses the right afforded to all when he takes the oath to practice law [A. 33].

Here, the Court is presented a delay of some nine years from the time a charge was made and trial had.

Justice Lee, dissenting, below, suggests that due process and fundamental fairness[3] require dismissal of cases fraught with an unreasonable delay [A. 30]. Justice McRae, dissenting. below, suggests that there must be a showing and finding for "good cause" for any delay, with the complainant having the burden of going forward,[4] and that absent such a showing and finding, the the accused is necessarily prejudiced, requiring dismissal of the proceeding [A. 32].

It is not disputed that the statutory period for trying cases was exceeded. The ruling below indicated that the violation of Rule 8.1 was tantamount to harmless error, but the result is that

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[2] For instance, constitutional projections are said to extend to a public servant when law affecting his employment is patently arbitrary, *Slochower v. Board of Higher Ed. of City of New York,* 350 U.S. 551 (1956), reh. denied 351 U.S. 946 (1956).

[3] See, for the fair play rationale, e.g. *International Shoe Co. v. Washington,* 326 U.S. 310 (1945); *McGee v. International Life Ins. Co.,* 355 U.S. 220 (1957).

[4] The complainant in both civil and criminal cases generally always has the burden of proof.

there is no statute of limitations, as a result, no time limits and no restraints whatsoever on prosecutions, a process unabashedly – and, it is submitted, patently arbitrarily – approved by Rule 26.[5]

The cases indicate various rationales on the issue of "speedy trial." Even those rejecting a Sixth Amendment "speedy trial" approach rights, generally offer some relief to the accused. Some of the rationales are:

Laches: The length of time in bringing the charges, as well as the period during which the charges were filed, is sufficient, without more, to dismiss the proceedings. *People ex rel. Colo. Bar Ass'n. v. Tanquary,* 48 Colo. 122, 109 P. 260 (1910) (eight and a half years held as too long); *Tenn. Bar Assoc. v. Berke,* 48 Tenn.App. 140, 344 S.W.2d 567 (1960) (nine and a half years held too long, case dismissed for laches); *Arden v. State Bar of Calif.*, 52 Cal.2d 310, 341 P.2d 6, 12 (1959) (case "hanging over the head" of the accused lawyer for three years held too long a period to prosecute ethics' charges).

Staleness: Over an undue period of time, cases have grown stale and must be dismissed. *Columbus Bar Assoc. v. Tedford,* 6 Ohio St.2d 253, 217 N.E.2d 872, 873 (1966); *State ex rel. Neb. State Bar Assoc. v. Richards,* 165 Neb. 80, 84 N.W.2d 136, 143 (1957). *In Re Smith,* 73 Kan. 743, 85 P. 584, 586 (1906).

Prejudice: A showing of prejudice, where time limits are exceeded, can result in dismissal for undue delay of the proceedings, *State Grievance Committee v. Rozbick,* 558 A.2d 989, 991 (Conn.1989); *In Re Charges of Unprofessional Conduct Against NP,* 361 N.W.2d 386, 393 (Mich.1985), app'l dism. 474

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[5] The rule specifies that violation of time-limitations "will not justify abatement of any disciplinary investigation or proceeding."

U.S. 976 (1985); *Attorney Grievance Committee v. Kahn,* 431 A.2d 1336, 1352 (Md.1981).

"Actual" Prejudice: While not dismissing a cause because a deadline has passed, a showing of actual prejudice is suggested could result in a due process violation, *In the Matter of Williams,* 513 A.2d 793, 797 (D.C.1986).

Fault: If there is undue delay, the case might not be dismissed if the delay was attributed to the accused, rather than to the prosecution, *In the Matter of Posner*, 339 A.2d 657, (Md.1975), cert. den. 425 U.S. 1016 (1975). Seemingly, however, the converse implication might be true: a case would be dismissed if the fault for delay was not the accused's; this "burden of proof" rationale is suggested by Justice McRae, dissenting, below.

No speedy trial defense at all: Although standing somewhat isolated, *In the Matter of O'Hara,* 408 N.Y.S.2d 70, 71 (N.Y.1978) holds that there are no speedy trial rights in any sense at all. The majority holding, below, would seemingly place Mississippi in this category, as well.

In the 1982 emancipation proceeding in which the original ethics' complaint arose, the father and daughter were the parties and, as such, would have been material witnesses in the grievance defense. They were present, willing and able to testify for many years, but by trial had left the jurisdiction and could not be subpoenaed.[6] They could have rebutted any prosecution witnesses or attested to the state of mind of Petitioner (a key element of the defense being the "good faith" of Petitioner). Earlier cases suggest that the inability of an attorney to secure witnesses which were available at an earlier time, resulting from an unreasonable delay, results in staleness

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[6] The father has since died.

of the charge. *In Re Smith,* 73 Kan. 743, 85 P. 584, 586 (1906).

In the instant case, prejudice to the attorney was compounded by the accused being constrained by the attorney-client privilege and, hence, being unable to testify about any conversations or dealings with the clients (necessarily pointing all the more to the materiality of the clients' appearance).

Petitioner made numerous motions to dismiss on due process and fundamental fairness grounds. There is no indication that he slumbered on his rights. His only "delay" was an injury which prompted a brief continuance *sua sponte* by the court, over his own objections, incidentally.

The court, below, suggests that strict construction of statutory time limits is appropriate for charges against elected officials public officials and teachers, but not against attorneys, but without any reasons for the distinction. Indeed, there seems to be no compelling state interest in differentiating between teachers and lawyers, when it comes to protecting due process rights. See *e.g. Smith v. Goguen,* 415 U.S. 566 (1974) (the potential for abuse from a measure which may treat those similarly situated differently is unconstitutional).

CONCLUSION

There is no cogent reason why lawyers should be due process "step children" simply because they are lawyers. Recognition of due process rights of lawyers has largely taken place in the past decade, with this case presenting an opportunity to improve the administration of justice and heighten public confidence in the judicial system.

The case could turn on constitutional rights or upon rule-

making and inherent powers of the Court,[7] itself.

This Court has often spoken of the "chilling effect" a measure may have on constitutional rights, as grounds to invalidate the measure. The Court may, also, underscore the potential for abuse where officials are given too wide a latitude in interpreting or implementing a given measure.[8] Here, under the challenged rules, as the rules are written or as applied, a complainant may decide to "sit on" a complaint until the composition of a court changes (a particularly odious form of "forum shopping," so to speak), until an aged witness dies or until a renown defense lawyer retires. Such manifest arbitrariness,[9] or the potential for such a result, is unjust.

Whether prejudice in lengthy and unreasonable delays in attorney ethics' cases necessarily comes from such long delays, due to witnesses being unavailable and memories dimming, or whether an accused must show actual prejudice, such as a specific witness being absent or some evidence having been lost, still, considerations of due process and fundamental fairness call for imposition of some standard, some limitation, to a prosecution.

Whether a proceeding is styled civil, quasi-criminal or criminal, a wholesale disregarding of statutory time limits within which to bring a prosecution, with a caveat that the time-limits are "not jurisdictional", is, itself, egregiously arbitrary

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[7] See *Ex Parte Secomb,* 60 U.S. 9 (1856) for an analysis of bench and bar relations.

[8] See *e.g. Forsyth County, Georgia v. The Nationalist Movement,* ___ U.S. ___, 112 S.Ct. 2395 (1992).

[9] Justice McRae, dissenting, below, when asking: What rules govern disciplinary proceedings? finds considerable confusion as to whether criminal or civil rules apply or, even, if any rules at all apply [A. 32].

and subject to intolerable abuse. A procedure, as is provided for below, whereby a hearing and finding may be entered showing "good cause" for any delays may pass constitutional muster. It certainly would allow for appellate review of any abuse. Here, however, such a procedure was ignored and no hearing or finding of "good cause" for the interminable delays was ever held or entered upon the record.

A standard suggested in dissent, below, is that a cause must be tried within a "reasonable time." That test seems sufficient. On such basis, alone, it would seem that a delay of some nine years is a manifestly unreasonable time. Or, the Court may adopt the "balancing test" analogous to that of *Barker v. Wingo,* 407 U.S. 514 (1972), which provides that the court examine the length of any delay, the reason for the delay, the accused's diligence in calling for trial and the prejudice, if any, to the accused.

Petitioner would suggest that the first two tests are crucial. There should be consideration of the length of the delay coupled with the reason for the delay. The third test may not be needed, insofar as there is some authority that an accused does not need to "bring himself to trial," so to speak. However, if the accused has occasioned the delays himself, such misadventure might be ascribed against him. The final test of prejudice may not be needed as a factor, if the delay is considerably lengthy and prejudice would necessarily be implied. This case, for instance, represents one of the longest delays on record in a disciplinary proceeding in this country. If the delay is sufficiently short, however, then some actual prejudice might need to be shown. Or, resort might be, by analogy, to other statutes of limitations[10], under the notion that most civil and criminal

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[10] The federal limitation for a suit enforcing a civil fine or penalty is five years. 28 *USC* §2462. Civil claims against the United States are barred

statutes of limitations fall far short of the almost nine-year period presented in this case.

For these and for all the reasons heretofore set forth, it is requested that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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CERTIFICATE

THIS CERTIFIES that the undersigned has, this day, mailed, postage pre-paid, requisite, true copies of the foregoing Petition for Writ of Certiorari to Michael Martz, Attorney for Respondent, at PO Box 2168, Jackson MS 39225.

THIS the 13th Day of October, 1994.

Richard Barrett

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after six years, tort claims after two years. 28 *USC* §2401(a), (b) Libel and slander, assault and battery, is one year. §15-1-35 *Miss. Code Ann. (1972).* Actions on judgments must be brought within seven years. §15-1-43 *Miss. Code Ann. (1972).* Limitations on fraudulent concealment runs from when "fraud shall be, or with reasonable diligence might have been, first known or discovered." §15-1-67 *Miss. Code Ann.. (1972).*

APPENDIX

IN THE SUPREME COURT OF MISSISSIPPI

No. 92-BA-00336

RICHARD BARRETT

v.

THE MISSISSIPPI BAR

EN BANC.

BANKS, JUSTICE, FOR THE COURT:

Today the issues we resolve center around an attorney's handling of a petition for the removal of disabilities pursuant to Miss. Code. Ann. §93-1919 (1972). We conclude that attorney Richard Barrett did not err in filing the petition for the removal of disabilities in Scott County. Despite that, we find that Barrett violated his oath of office, as well as Mississippi Code o Professional Responsibility, Disciplinary Rules 102(A)(4,5, ad 6) by failing to inform the court that a guardianship existed in Rankin County. Consequently, we affirm the public reprimand ordered by the tribunal.

Conversely, even though we conclude that while Barrett engaged in unnecessary gamesmanship when he refused to move for a continuance, he should not incur a fine where the tribunal continued the manner [sic], *sua sponte*, based on its assessment that Barrett was present and continuing to refuse to request a continuance, for the stated reason of preserving his "speedy trial"argument. We vacate the order assessing the fine.

I.

This appeal arises out of a disciplinary hearing in which the Complaint Tribunal of the Southern District of the Mississippi State Bar found that Richard Barrett violated DR's 1-102(A)(3, 4, 5 and 6) of the Mississippi Code of Professional Responsibility and the Attorney's Oath of Office. The complaint was filed in 1982. The merits of the case were not heard until 1991 due to delays caused by the Bar and Barrett. After a full hearing in May of 1991, The Tribunal imposed a public reprimand as the appropriate sanction. Barrett filed a motion for reconsideration. The motion was denied. Barrett appealed. The Bar cross appealed.

The basis of the Bar's action against Barrett resolves around Barrett's representation of the McPherson family (Charles, the father, and Brenda, the daughter) in a removal of disabilities proceeding in the Chancery Court of Scott County. Shirley MacPherson [sic], Charles' former wife and Brenda's mother, was killed in an automobile accident on January 18, 1978. Brenda, who was then fourteen-years old, was Shirley's only surviving heir.

On July 17, 1978, Charles, represented by Barrett, filed a petition for general guardianship of the person and estate of Brenda wherein he asked to be appointed general guardian of said minor and to be authorized to pursue whatever actions at law or equity against various individuals or entitles, who may be liable to Brenda. On the same day a decree appointing Charles as the guardian over his daughter's person was entered. Charles also filed on that day a petition to sell Shirley's residence for $15,000. The chancellor disapproved the sale because he was personally familiar with the value of the property involved. The chancellor ordered an appraiser's opinion concerning the fair market value of the house. On July 21, 1978, an amendment to petition for sale of real property was

filed by Charles to sell Shirley's property for $23,000. The appraisal placed the value of the house at $22,000. The petition was granted.

On August 17, 1978, Charles filed a petition to substitute guardian as plaintiff in an action pending, for authority to settle an insurance suit for $10,000, to approve an attorney contract and fee of $5,000, to pay funds and to provide allowance to guardian for ward. The court granted the relief sought by Charles with the exception that only $500 was approved for Barrett's attorney fees because he did not support his request with the production of sufficient documentation justifying a larger fee.

Charles' father Bill was appointed guardian ad litem in March of 1978. The Court found of its own motion and for good cause shown, that Charles has absented himself from the jurisdiction of the court, had neglected and failed to perform his duties and responsibilities as guardian and it was reasonable and proper for Charles to be removed as guardian.

Barrett later filed a petition for permission to withdraw as counsel for the minor and for payment of attorney fees. In his petition, Barrett alleged that despite diligent effort, he had not been able to locate his client. An ex parte hearing was held before the Chancery Court of Rankin County, Mississippi, resulting in the entry of a decree approving final accounting, removing Charles as guardian, removing Bill McPherson, Brenda's grandfather, as guardian ad litem, appointing the chancery clerk as guardian, and approving withdrawal of counsel and granting leave to Barrett to become a party in the guardianship case for the purpose of protecting any attorney fees awarded to him for service he had provided the guardianship.

From August of 1979 until February 1982, the guardianship and estate remained dormant. In February 1982, Barrett asked

Hinds County Chancellor Paul Alexander what the usual procedure would be with regard to the removal of disability of minority for a minor. Barrett made the same inquiry with the Rankin County Chancellor, who wanted to know to which case he was making reference. Barrett informed the chancellor that the reference involved the case of Brenda Carol McPherson. The chancellor looked through Brenda's file and found a draft of the petition to remove the disability of minority. The chancellor informed Barrett that he would require extensive proof of the minor's ability to manage her own estate before he would consider removing her disability of minority.

Subsequently, it is alleged, the McPhersons moved to Scott County. On March 3, 1982, Barrett filed a petition for general removal of disability of minority on behalf of Brenda in the Chancery Court of Scott County, Mississippi. Charles and Bill, Brenda's father and grandfather, joined in the petition. The petition was heard on an ex parte basis before the special chancellor. According to the chancellor, the reason given for the removal of disabilities was Brenda wanted to enter the restaurant business with Charles and Bill and needed to be able to sign contracts and enter into various business relationships on behalf of the restaurant enterprise. Although the question of financing the restaurant arose, neither Barrett nor his clients informed the chancellor that Brenda wanted to enter a business venture and stood to gain access to approximately $20,000 in her guardianship estate.

The special chancellor granted the petition on March 3, 1982. Six days later Barrett filed a petition for closing estate, for dissolution of guardianship, for accounting and disbursal of funds to be filed by Brenda in the Chancery Court of Rankin County, Mississippi. The Rankin County chancellor then contacted the special chancellor and informed him of the possibility of fraudulent procurement of a decree in Scott County Chancery Court removing the disability of the minor.

Prior to that occasion, the Rankin County Chancellor wrote that special chancellor a letter informing him that he expected Barrett to file a petition to close the guardianship and that such petition had now been filed. The special chancellor informed the Rankin County court that no mention was made of any pending guardianship matter when the petition came before him, and he noted that he felt he "was misled by the witnesses who testified."

On April 21, 1982, a hearing was held in Rankin County Chancery Court before Judge Bridges concerning what evidence, if any, was presented to the Chancellor of the Second Chancery Court District involving the existence of the guardianship. No evidence was adduced indicating that there was any mention of an ongoing active guardianship for Brenda's benefit. On April 22, 1982, Barrett filed a Motion for Recusal of the Chancellor of Rankin County pursuant to §165 of the Constitution of the State of Mississippi. The chancellor entered an order on February 24, 1983, recusing himself as chancellor in the guardianship of Brenda Carol McPherson and estate of Shirley McPherson. The chancellor appointed Chancellor Paul Alexander upon agreement of all parties. The guardianship and estate cases were transferred on August 31, 1983, to the Scott County Chancery Court at the request of Brenda. The removal of disability petition was affirmed.

More than five years later, the Bar filed a formal complaint against Barrett charging him with violating the Mississippi Code of Professional Responsibility. The Tribunal set the trial date for August 30, 1989. The Bar in its Motion to set a trial date noted that the 180-day rule, governing tribunal adjudications, would run on June 5, 1989. The Tribunal continued this case four times before reaching the merits. Trial dates were set for August 30, 1989, September 5, 1989, December 8, 1989, March 14, 1990, and May 23, 1990. There was no objection to the August trial date, even though it came

after the 180-day rule had expired. The September 5 trial date was rescheduled because the assistant general counsel assigned to prosecute this case was pregnant. Chancellor Billy Bridges, a material witness, was not available on December 8, and the trial was continued. On its own motion on March 14, 1990, the Tribunal set the trial date for May 23. On April 10, 1990, Barrett filed a motion to dismiss. IT was denied. On May 23, Barrett appeared in court in a half-body case and under the influence of prescription drugs. Barrett refused to move for a continuance. The presiding judge granted a continuance. A trial on the merits commenced on May 3, 1991.

II.

Barrett contends that the trial court erred in disciplining him because his position in representing his client was supported by the law or by a good faith argument. That is, under the law of this state, Barrett could lawfully file a petition for the removal of disabilities in the county where the minor resided. In addition, Barrett argues he acted in good faith when he filed the petition in Scott County.

Conversely, the Bar contends that Barrett did not act in good faith. Since Charles had been removed as Brenda's guardian, the Bar argues, Barrett should have filed the petition for the removal of disabilities in Rankin County, where the chancellor had been appointed as Brenda's guardian. We disagree.

Miss. Code Ann. section 93-19-1 provides:

> The chancery court of the county in which a minor resides, or the chancery court of a county in which a resident minor owns real estate in matters pertaining to such real estate, may remove the disability of minority of such minor.

The language in section 93-19-1 is quite clear. It explicitly

permits the removal of disability in the county where the minor resides or owns real property. Although Barrett had two options as to where he could file the petition for the removal of disability, he opted to file the petition in the county in which Brenda resided. Thus, Barrett's conduct fell within the purview of section 93-19-1.

We reject the Bar's contention that Barrett should have filed the petition in the Chancery Court of Rankin County. There is no basis to support such a contention. The statute does not require that a petition for the removal of disabilities be brought in [the] same court where the guardianship has been established. Rankin County was not the proper place to file a removal petition because Brenda's residence was not there and she did not own any real property in that county. Additionally, there was no evidence that Brenda owned real property anywhere in Mississippi. Scott County was the only proper place to file the petition because Brenda resided there. Barrett did not act contrary to law when he filed there.

III.

Having resolved the issue where Barrett could have filed the petition for the removal of disabilities, we turn to Barrett's duty to the court upon filing the petition. Here, we focus on what Barrett should have done once he filed the petition in Scott County.

Barrett contends that the tribunal erred in finding that he violated DR 1-102(A)(3, 4, 5, and 6) of the Code of Professional Responsibility and section 73-3-35 of the Mississippi Code Annotated (1972).

This Court is charged by law to inquire whether the evidence before a Complaint Tribunal is clear and convincing. "In an attorney disciplinary proceeding, the Supreme Court is the supreme trier of fact, and as a matter of law, is not bound by

any findings of fact made by the Complaint Tribunal." *Goeldner v. Mississippi State Bar Ass'n*, 525 So.2d 403, 406 (Miss.1988).

The attorney's oath is found in Miss. Code Ann. §73-3-35 (Supp.1988). It provides that:

> Every attorney and counselor at law, before he shall be permitted to practice, shall produce his license in each court where he intends to practice, and in the presence of such court, shall take the following oath or affirmation to wit: "I do solemnly swear (or affirm) that I will demean myself, as an attorney and counselor of this court, according to the best of my learning and ability, and with all good fidelity as well to the court as to the client; that I will use no falsehood nor delay any person's cause for lucre or malice, and that I will support the constitution of the State of Mississippi so long as I continue a citizen thereof. So help me God."

DR 1-102(A)(4), (5), and (6) of the Code of Professional Responsibility[1] provides: "a lawyer shall not engage in illegal conduct involving moral turpitude, engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, engage in conduct that is prejudicial to the administration of justice, or engage in any other conduct that adversely reflects on his fitness to practice law."

The question before this Court is whether our law required Barrett to disclose the existence of a guardianship in Rankin

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[1] This provision was applicable at the time of occurrence of the offense here charged.

County to the chancellor in Scott County. We answer in the affirmative.

"An attorney in his dealings with the court should always make full disclosure to the court and should never seek to mislead the court into unnecessary or unwarranted action by any artifice or concealment." *State v. Weinstein*, 411 S.W.2d 267 (1967). In *Weinstein,* the relators' attorney failed to disclose the existence of the entry of appearance and request make of the state when he filed the relators' Petition for Write of Prohibition. The *Weinstein* Court stated that "it was the responsibility and duty or [sic] relators' attorney to give us a frank and complete resume of all the actions he had taken in the Juvenile Court proceeding that was pending before respondent at the time said attorney filed relators' Petition for Writ of Prohibition."

We conclude that Barrett had a duty to make full disclosure to the chancellor of Scott County regarding the existence of a guardianship in Rankin County. While not explicitly stated in our rules, the attorney's oath of office required Barrett to deal honestly with the court. The duty to deal honestly with the court requires the disclosure of all material facts. Here, the court was only told that Brenda was 19 years old and that she needed her disability removed so she could enter into a restaurant business with her father and grandfather. When asked how the venture was to be financed, the parties spoke of a loan. This was only half of the story.

In the face of a keen interest by the court into the reason for removal of disability and the financial resources for the proposed restaurant venture, Barrett and his clients failed to disclose the separate estate of the minor child which was the subject of a guardianship in Rankin County. Certainly, it was relevant to the court that the minor had an estate in another county which she could not, in the absence of removal of the

disability of minority, dispose of summarily. Moreover, Chancellor Bridges had informed Barrett that if the petition came before him he would inquire extensively into Brenda's ability to manage her estate.

While the existence of a guardianship in another county may not have ultimately affected the chancellor's decision to grant the petition, it is necessary that a court removing disability have all pertinent information concerning the circumstances of a minor's life. Since the chancellor was not informed of the guardianship in Rankin County, the parties deprived him of an opportunity to consider relevant information regarding the removal of disability.

Barrett contends that his failure to disclose was the "honorable presentation of his client's cause." To support his contention, Barrett cites *McCartney v. United States,* 343 F.2d 471, 472 (9th Cir.1965), for the proposition that an attorney has the duty to honorably present his client's contentions in the light most favorable to his client.

While it is true that attorneys are charged with the duty of honorably representing their clients, that duty of honorable representation does not relieve an attorney of his duty to make full disclosure to the court. When representing a client before a court, an attorney has a duty to conduct himself "according to the best of my learning and ability, *and with all good fidelity as well to the court as to the client.*" See Miss. Code Ann. 73-3-35. (Emphasis supplied.)

In addition, Barrett violated DR 102(A)(4),(5), and (6). By failing to disclose all relevant information to the court, Barrett engaged in conduct involving dishonesty. Such conduct was prejudicial to the administration of justice and adversely reflects on Barrett's fitness to practice law.

IV.

Barrett contends that these proceedings should be dismissed for lack of a speedy trial. Barrett can not prevail on the deprivation of a speedy trial issue because there is no evidence that Barrett was prejudiced by the delay. *Myers v. Miss. State Bar,* 480 So.2d 1080 (Miss.1985).

Barrett contends that Mississippi recognizes the speedy trial rule of *Barker v. Wingo*, 407 U.S. 514 (1972). He is correct. *See, Perry v. State,* 419 So.2d 194 (Miss.1982). However, Barrett failed to cite any authority that stands for the proposition that Mississippi imposes the same speedy trial requirements in disciplinary actions that it imposes in criminal cases. The fact is, we have recently rejected just that contention. *The Mississippi Bar v. An Attorney*, No. 92-BA-00474, (Feb. 24, 1994).

Barrett's classification of disciplinary proceedings as quasi-criminal is correct. This Court on several occasions has recognized that bar disciplinary proceedings are inherently adversary proceedings of a quasi-criminal nature. *Attorney K v. Mississippi State Bar,* 491 So.2d 220 (Miss.1986), citing *Levi v. Mississippi State Bar,* 436 So.2d 781, 783 (Miss.1983). However, it does not follow that the same rules governing criminal cases govern quasi-criminal actions. *Barker* and *Perry* address the constitutional right to speedy trial applicable to criminal cases. A disciplinary action is not a criminal action and there is nothing in our case law that indicates that the same balancing test used in criminal proceedings must be utilized in disciplinary actions. This is accord with most states. Some states have held that the right to a speedy trial has no application whatever to a disciplinary proceeding against an attorney. *In the Matter of Williams,* 513 A.2d 793, 796 (D.C.1986); *In the Matter of O'Hara,* 408 N.Y.S.2d 70, 71 (N.Y.1978); *In the Matter of Posner,* 339 A.2d 657, 660

(Md.1975), *cert. den.* 425 U.S. 1016 (1975).

We recognize the need to dispose of disciplinary actions in a timely fashion. Rule 8.1 sets forth the time in which a disciplinary action should be adjudicated. It provides:

> Within ten (10) days following the designation of a complaint tribunal, the presiding judge shall establish a tentative schedule for discovery, motion hearings and ruling, trial and adjudication, all of which shall be completed within one hundred and eighty days from the date of the designation of the Tribunal, unless extended by the court on motion of either party for good cause shown.

Mississippi Code of Professional Responsibility DR 8.1 (1983).

In the instant case, the matter was not disposed of within the 180-day time frame. There were four delays before the merits of the case were heard. The question here is whether good cause was shown for extending the 180-day period. Barrett claims that the burden is on the bar to show that there was good cause for the delay. He cites *Nations v. State,* 481 So.2d 760, 761 (Miss.1985), to support his position.

Nations is distinguishable from this case, as it involved a criminally accused's right to a speedy trial pursuant to Miss. Code Ann. 97-17-1. This is a disciplinary proceeding, and although it is quasi-criminal in nature, it is not governed by the same rules that are utilized in criminal proceedings.

In *Myers* we held that the time limitations in §§73-3-319 and 325 are directory rather than jurisdictional. 480 So.2d at 1090. In dicta, we stated that "Strict construction of statutory time limits seems much more appropriate in election contests and non-tenured teacher dismissals than in the more cautious context of attorney disciplinary proceedings."

Barrett would have to demonstrate that he was substantially prejudiced by the delays before this court could determine that he was deprived of his right to a fair trial. *Id.; Mississippi Bar v. An Attorney,* Slip Opinion at p. 7. Barrett alleges that he was prejudiced "because material witnesses, the McPhersons present in the state during the initial phase when a speedy trial might have been had, were absent from the state and unavailable as witnesses, to the necessary and manifest prejudice of appellant."

Although Barrett contends that the McPhersons were materials witnesses, there is nothing in the record to support his allegation. Absent from the record is any indication that the McPhersons would be called as witnesses in the case or had anything of value to add. In fact, the McPhersons were never subpoenaed. Additionally, they never testified in any of the previous hearings. As such, Barrett has not demonstrated that he intended to call the McPhersons. Therefore, their absence cannot be used to support his claim of prejudice. It follows that Barrett's speedy trial claim must fail. *Id.*

V.

Barrett urges that it was error to assess expenses against him without substantial justification. In the instant case, the tribunal judge assessed additional costs against Barrett because Barrett refused to move for a continuance in a misguided effort to preserve his speedy trial argument.

Disciplinary Rule 27 of the Mississippi Rules of Professional Responsibility provides:

> A Tribunal or the Court may assess costs incurred in the investigation, prosecution and defense of any disciplinary matter as justice may require. Such costs and expenses shall include the actual and reasonably necessary expenses of the Bar, excluding Complaint Counsel's time.

We agree with Barrett to the extent that cost have been assessed to him as a sanction for his failure to request a continuance. While Barrett may have engaged in unnecessary gamesmanship, his failure to request a continuance was his right and he should not incur additional costs where the tribunal continued the manner [sic] *sua sponte* based on its assessment that Barrett was not physically able to proceed despite the fact that Barrett was present and continuing to refuse to request a continuance in order to preserve his speedy trial argument. That is not to say that the tribunal erred in continuing the matter. We only say that Barrett's refusal to request a continuance should not incur a sanction. To the extend that the continuance increased the "actual and reasonably necessary expenses of the Bar," Barrett is liable only because misconduct was ultimately found. Rule 27(a) and (b), Rules of Discipline.

It is not clear to this court whether Barrett has been assessed any costs that he would not ordinarily have been assessed as lawyer against whom discipline is imposed. To the extend that cost [sic] has been assessed which would not have been assessed to Barrett as a losing party, the order of the tribunal assessing costs is vacated.

VI.

On cross appeal, the Bar argues that Barrett should be sanctioned more severely that a public reprimand because of his willful and intentional misconduct as well as prior discipline that has been imposed upon him. The Bar cites a litany of cases in support of its contention. We reject the Bar's assertion.

In disciplinary matters, this Court by law is the finder of fact. or great respect and appreciation for the work of those who serve on the complaint tribunals may not, as a matter of law, translate into any duty of deference to findings or decision their [sic] made. In practical effect, we proceed *ab initio. Attorney Q v. Mississippi State Bar,* 587 So.2d 228, 231, citing

Mississippi State Bar v. Odom, 566 So.2d 712, 714 (Miss.1990); *Mississippi State Bar v. Nichols,* 562 So.2d 1285, 1287 (Miss.1990); *Mississippi State Bar v. Varnado*, 557 So.2d 558, 559; *Levi v. Mississippi State Bar,* 436 So.2d 781, 783 (Miss.1983).

Nevertheless, we reluctantly ratify the sanction recommended by the tribunal. While Barrett's conduct violated a reasonable interpretation of his oath and our rules, it transgressed no explicit provision or prohibition. The Bar's protracted delay in institution these proceedings may also have been considered by the tribunal.

CONCLUSION

For the foregoing reasons the order of the tribunal imposing a public reprimand is affirmed and the order taxing costs is vacated with costs for these proceedings to be taxes in a subsequent order of this court.

ORDER OF COMPLAINT TRIBUNAL AFFIRMED IN PART AND REVERSED IN PART.

HAWKINS, C.J., PRATHER, P.J., SULLIVAN, AND PITTMAN, JJ., CONCUR. ROBERTS, J., CONCURS IN RESULT ONLY. LEE, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION. McRAE, J., DISSENTS WITH SEPARATE WRITTEN OPINION. SMITH, J., NOT PARTICIPATING.

IN THE SUPREME COURT OF MISSISSIPPI

No. 92-BA-00336

RICHARD BARRETT

v.

THE MISSISSIPPI BAR

LEE, PRESIDING JUSTICE, DISSENTING:

I agree with the majority opinion except for those portions that effectively deny attorneys in this State any right to a speedy resolution of disciplinary proceedings.

As I stated in my earlier dissent in *The Mississippi Bar v. An Attorney,* 92-BA-00474 (Feb. 24, 1994), I do not believe that a criminally accused's right to a speedy trial as announced in *Barker v. Wingo,* 407 U.S. 514 (1972), extends to bar disciplinary proceedings. But I cannot agree that attorneys facing serious penalties have no constitutionally protected interest in an expeditious resolution. Due process and fundamental fairness require that an attorney not be called upon in 1991 to defend against a complaint filed in 1982, where no good reason is shown for the Bar's delay. To quote from my earlier dissent on the subject of speedy resolution of disciplinary proceedings:

> That due process must be afforded to attorneys in disciplinary proceedings is beyond peradventure. See *Netterville v. Mississippi State Bar,* 397 So.2d 878 (Miss.1981). As this Court has recently stated:
>
> We have repeatedly held that attorneys who are accused in bar disciplinary proceedings have the right to due process of law, *Attorney K. v.*

Mississippi State Bar Association, 491 So.2d 220, 222 (Miss.1986); *Myers v. Mississippi State Bar,* 480 So.2d 1080, 1087 (Miss.1985)[;] *Netterville v. Mississippi State Bar,* 397 So.2d 878, 883-84 (Miss.1981), although it is not at all clear that attorneys would be without this right if disciplinary proceedings were regarded as wholly civil in nature.

Mississippi State Bar v. Young, 509 So.2d 210, 212 (Miss.1987).

...

Rule 8.1 of the Mississippi Rules of Discipline clearly provides that proceedings "shall be completed within 180 days from the date of the designation of the tribunal, unless extended by the court on motion of either party for good cause shown."

Rule 26 provides, in pertinent part:

References to time within these rules and procedural sections are directory and not jurisdictional. Time limitations are administrative, not jurisdictional; however, the time for filing appeals or seeking reinstatement shall be jurisdictional. Failure to observe directory time interval may result in contempt of the agency having jurisdiction but will not justify abatement of any disciplinary investigation or proceeding.

In my estimation, the remedy provided by Rule 26 is woefully insufficient as a safeguard for the due process right to a speedy resolution of disciplinary proceedings.

> I would interpret Rule 8.1 as a[n absolute] requirement and hold that violations without a finding of good cause require dismissal of the complaint.

The Mississippi Bar v. An Attorney, 92-BA-00474 (Feb. 24, 1994) (Lee, P.J. dissenting).

No good can come from this Court allowing the State Bar to sit on a complaint against an attorney for almost nine years. Accused attorneys are entitled to faster resolution and members of the public deserve more timely protection. Regrettably, the only way to create an effective incentive for the Bar to act seasonably is to reverse sanctions imposed after an unreasonable delay. Furthermore, Rule 8.1 establishes a generous time frame for handling bar matters (which was also exceeded in this case), and I think this Court should enforce it. Accordingly, I would also reverse the public reprimand and dismiss the Bar's complaint with prejudice.

IN THE SUPREME COURT OF MISSISSIPPI

No. 92-BA-00336

RICHARD BARRETT

v.

THE MISSISSIPPI BAR

McRAE, JUSTICE, DISSENTING:

I concur with Presiding Justice Lee's dissent that the basic tenets of due process and fundamental fairness command that a lawyer should not be required to defend himself in 1991 against a complaint filed against him in 1982 where no good cause has been shown for the Mississippi Bar's delay. However, I disagree with the majority's opinion for the same reasons I dissented in *The Mississippi Bar v. An Attorney,* 636 So.2d 371 (Miss.1994).

The majority concedes that disciplinary proceedings are quasi-criminal in nature but holds that Mississippi's case law does not require that the same balancing test used in criminal proceedings be employed in disciplinary proceedings. Specifically, the majority states, "[I]t does not follow that the same rules governing criminal cases govern quasi-criminal actions." The majority does not recognize Rule 8.1 of the Rules of Discipline for the Mississippi Bar, which provides:

Within ten (10) days following the designation of a Complaint Tribunal, the presiding judge shall establish a tentative schedule for discovery, motion hearings and rulings, trial and adjudication, all of which shall be completed within one hundred and eighty (180) days from the date of the designation of the Tribunal, *unless extended by the Court on*

motion of either party for good cause shown. (emphasis added).

Specifically quoting from my earlier dissent concerning Rule 8.1:

> The word "shall" obviously has no further meaning than "will" or "may." ...The majority denies an attorney the right to argue a technical defense, i.e. the rules regarding a speedy disposition of a matter before the Complaint Tribunal, but the Bar, however, is permitted to use technical devices such as default judgments when an attorney fails to timely file a response.

636 So.2d 376.

The majority states that the question that must be answered is "whether good cause was shown for extending the 180-delay period." Barrett argues that the burden of proof rests with the Mississippi Bar in showing that there was good cause for the close to nine year delay. The majority skirts around this real issue as it never addresses the question of which party has the burden of proof in such a case. The majority argues that Barrett's authority, *Nations v. State,* 481 So.2d 760, 761 (Miss.1985), which holds that the prosecution bears the burden of proving a good cause when the record is silent, is distinguishable from the case at hand because it involved a criminal charge. In very general terms and without holding who has the burden of proof, the majority distinguished, "This is a disciplinary proceeding, and although it is quasi-criminal, it is not governed by [the] same rules that are utilized in criminal proceedings." Query: What rules govern disciplinary proceedings? Why employ rules from civil proceedings rather than criminal proceedings when it is our law that disciplinary proceedings are more closely related to criminal charges and defined as quasi-criminal?

It is irrational to hold that Barrett himself must show that the Mississippi Bar did not have a good reason to request a delay. Who else is in a better position to show good cause by the Bar itself? There is no dispute that in a disciplinary proceeding, the Bar is the moving party and Barrett is the responding party. When an attorney brings any type of motion before either chancery or circuit court, that attorney has the burden of proving his motions. There simply can be no distinction between the two scenarios. Because the Bar did not show any good cause for the extended period of time, Barrett should not have to defend himself in an action that is nearly nine years old.

In any event, a statute of limitations should apply at some point regardless of whether this Court holds that a disciplinary proceeding is governed by criminal rules or civil rules. As I articulated in my dissent in *The Mississippi Bar v. An Attorney:*

> I can find nothing in the state and federal constitutions, Mississippi case law, Rules of Professional Conduct or Rules of Discipline stating an attorney loses the rights afforded to all when he or she takes the oath to practice law.

636 So.2d 377.

With the majority's holding, an attorney, when faced with a disciplinary action, does not have the rights that are granted to all other citizens of this great nation. The majority holds that no prejudice existed due to the long period of time. To the contrary, the fact alone that a Bar complaint has been filed torments a lawyer until the matter is resolved. A Bar complaint is indeed prejudicial to an attorney as he remains in purgatory until the resolution of the matter. Because lawyers should not have to give up any rights to become a lawyer, particularly statute of limitations, I respectfully dissent.